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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID BROOKMYER, as Personal)
Representative of the Estate of Norma Brookmyer,)

Appellant-Plaintiff,)

vs.)

CAROL BAKER,)

Appellee-Defendant.)

No. 90A02-0603-CV-198

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable Philip E. Houk, Special Judge
Cause No. 90C01-0404-EU-21

August 22, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

David Brookmyer (“David”), as personal representative for the estate of Norma L. Brookmyer, appeals from the probate court’s order closing the estate. David presents two issues for review, namely:

1. Whether the probate court abused its discretion when it denied David’s request to extend the discovery deadline in the administration of the estate.
2. Whether the probate court abused its discretion when it entered its order closing the estate.

We affirm.

FACTS AND PROCEDURAL HISTORY

Norma L. Brookmyer (“Norma”) died testate on August 19, 2001. Her daughter, Carol Baker, was her attorney in fact before her death. At Norma’s death, Baker and David, Norma’s adult son, were her heirs. On April 20, 2004, David filed a petition to probate Norma’s will, and the probate court granted his request to be appointed the estate’s personal representative. Baker intervened, and, on July 9, 2004, Baker filed a petition to remove David as personal representative. The parties agreed to a special judge. After a hearing, the probate court denied both Baker’s petition to remove the personal representative and David’s motion for summary judgment regarding that petition.

On January 4, 2005, the probate court ordered the estate to be administered as a supervised estate and ordered David to file an inventory within thirty days. On February 2, 2005, the court granted an extension of sixty days to file the inventory and ordered the parties to conclude all discovery by May 6, 2005. On March 14, 2005, Baker filed notice

of her discovery responses. And on April 4, 2005, David, although represented by counsel, filed an inventory pro se. Shortly thereafter, David's counsel withdrew. On May 3, 2005, David's new counsel filed his appearance, and on May 12, 2005, after a hearing, the probate court ordered David to conclude administration by June 10, 2005.

On June 9, 2005, David filed his Personal Representative's Report to the Court on the Estate of Norma Brookmyer. On July 18, 2005, the probate court entered its order closing Norma's estate and discharging David as personal representative. David filed a motion to correct error. After a hearing, the probate court amended its order but denied that motion. David then filed two additional motions to correct error. The probate court then further modified its July 18 order and, after a single hearing on the second and third motions to correct error, the probate court denied those motions. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Discovery Deadline

David first contends that the probate court abused its discretion when it failed to extend a discovery deadline in the administration of Norma's estate. "A personal representative shall exercise reasonable diligence to discover the reasonably ascertainable creditors of the decedent within three (3) months of the first publication of notice under [Indiana Code Section 29-1-7-7]." Ind. Code § 29-1-7-7.5. Here, the estate was opened on April 20, 2004, and the probate court appointed David as the estate's personal representative. Ten months later, David sought an extension of time to file an inventory. On February 2, 2005, the probate court granted David a sixty-day extension to file the inventory and ordered discovery to conclude by May 6, 2005. David filed an inventory

on April 4, 2005, without the assistance of his counsel. David's counsel withdrew shortly afterward, and new counsel filed an appearance on May 3, 2005.

David argues that the probate court abused its discretion when it refused to extend the discovery deadline because his new counsel was "essentially given three days to complete his discovery." Appellant's Brief at 15. We cannot agree. First, David does not cite to any part of the record to show that he requested an extension of the discovery deadline before it had passed. Instead, David merely notes that his report to the court filed June 9, 2005 includes a request for more time to investigate a possible claim against Baker. Because David has not shown that the probate court refused a request to extend the discovery deadline, he has not shown that it abused its discretion by enforcing that deadline.

Additionally, David incorrectly focuses on the amount of time his new counsel had to investigate a possible claim against Baker. Aside from a two-week period immediately before the discovery deadline, David was represented by counsel throughout the administration period of the estate. David had more than one year after opening the estate and three months after receiving notice of the May 6, 2005 deadline to complete discovery. He cannot now argue that he was not allowed enough time to investigate a possible claim against Baker. He appears to have conceded as much when he stated, "David and the claimant [against the estate], the State of Indiana, may be paying the price for prior inaction." Appellant's Brief at 16. As noted above, David has not shown that he requested an extension of the discovery deadline before it passed. Thus, David's

inaction, not the court's enforcement of the discovery deadline, resulted in David's inability to completely investigate an alleged claim against Baker.

We also note that the record shows that David began questioning Baker about her use of Norma's assets several years earlier. Indeed, at the September 20, 2005 hearing on David's first motion to correct error, he testified that he had made a written request for an accounting from Baker in October 2001 and had never received an accounting from her.¹ Yet prior correspondence exchanged between David and Norma's estate planning attorney indicates that David questioned Baker's administration of Norma's assets and cash. David was aware of a potential claim against Baker regarding her performance as Norma's attorney in fact even before Norma's death in 2001. Thus, the two-year limitation period for a claim against an attorney in fact had run before David opened the estate in 2004. See Mack v. Am. Fletcher Nat'l Bank & Trust Co., 510 N.E.2d 725, 738-39 (Ind. Ct. App. 1987) (two-year limitation period for torts applies to tort claims against trustees). As a result, even if David had been given additional time to investigate a possible claim against Baker, he was barred from asserting such a claim.²

David's argument that the limitations period was tolled is without merit. Specifically, he contends that Baker's failure to produce an accounting prevented

¹ The demand letter referred to was offered as an exhibit at the hearing on the first motion to correct error. In that letter, David "demand[ed] to have all [of Norma's] medical records, financial records, tax returns and tax work sheets made available, for [his] review, by the date of November 16, 2001." Exhibit Binder at L. An accounting by an attorney in fact is comprised of a "record of all transactions entered into by the attorney in fact on behalf of the principal" Ind. Code § 30-5-6-4. David's letter did not constitute a request for an accounting because it did not request a record of the transactions that Baker entered into on behalf of Norma.

² David also asserts that Norma did not have the capacity to execute the second power of attorney in favor of Baker. We need not address that claim because we conclude that any claim against Baker arising from her performance as Norma's attorney in fact is barred by the limitations period.

discovery of any wrongdoing and, therefore, that the limitations period was tolled under the doctrine of fraudulent concealment. The doctrine of fraudulent concealment operates to estop a defendant from asserting a statute of limitations defense when that person, by deception or a violation of a duty, has concealed material facts from the plaintiff thereby preventing discovery of a wrong. Keesling v. Baker & Daniels, 571 N.E.2d 562, 565 (Ind. Ct. App. 1991), trans. denied, (citations omitted). Fraudulent concealment can arise from either active efforts to conceal malpractice, or from a failure to disclose material information when a fiduciary or confidential relationship exists. Id. Affirmative acts of concealment must be calculated to mislead and hinder a plaintiff from obtaining information by the use of ordinary diligence, or to prevent inquiry or elude investigation. Id. “There must be some trick or contrivance intended by the defrauder to exclude suspicion and prevent inquiry.” Id. (citation omitted).

Here, David has cited no evidence to support an allegation of active fraudulent concealment. As noted above, he did not request an accounting of Baker’s activities as attorney in fact under Indiana Code Section 30-5-6-4, nor did he seek assistance from the court or through other means to obtain an accounting from Baker. As such, David has not shown use of ordinary diligence to investigate a potential claim against Baker nor did he list a contingent or absolute claim on his inventory. Thus, we conclude that the limitations period was not tolled under the doctrine of fraudulent concealment.

Issue Two: Closing the Estate

The personal representative “shall close the estate as promptly as possible” and not later than one year from his appointment unless good cause is shown. Ind. Code § 29-1-

16-2. Indiana Code Section 29-1-17-2 provides the general procedure for closing a decedent's estate:

After the expiration of the time limit for the filing of claims, and after all claims against the estate, including state and federal inheritance and estate taxes, have been determined, paid, or provision made therefor, except contingent and unmatured claims which cannot then be paid, the personal representative shall, if the estate is in a condition to be closed, render his final account and at the same time petition the court to decree the final distribution of the estate. Notice of the hearing of the petition shall be given to all interested persons.

Ind. Code § 29-1-17-2(a). In the case of supervised estates, the personal representative “may file an accounting at any time but must account . . . whenever the court on its own motion . . . so orders.” Ind. Code § 29-1-16-3(d). The probate court is given the power to punish by fine or imprisonment a personal representative who fails to comply with an order of the court to file his account. See Ind. Code § 29-1-16-10.

Here, the probate court ordered David to file a final report after the estate had been open for more than one year. In particular, David was appointed the personal representative of Norma's estate on April 20, 2004, and the court ordered supervised administration of the estate on January 4, 2005. On April 4, 2005, without the assistance of his attorney, David filed a document that purported to be an inventory of the estate. The estate was still open when the court held a status conference on May 3, 2005, more than one year after David had been appointed personal representative. At that conference, the court ordered David to conclude administration on or before June 10, 2005. David filed his report on June 9, 2005, and the probate court issued its order discharging David as personal representative and closing the estate on July 18, 2005.

In support of his argument, David asserts that his report was not a “final report” because it revealed a “potential claim against [Baker] which could not be determined as additional discovery was needed.” Appellant’s Brief at 7. In essence, David challenges the probate court’s determination that the estate is insolvent and its resulting use of the summary closing procedure for insolvent estates. Although David made clear that he did not intend his report to be a final report, after considering the report the court determined Norma’s estate to be insolvent. The court found in relevant part:

9. The “Inventory” document does not list any items of probate significance. A list of household items is included, and a cemetery plot with an “unknown value” are listed.
10. The “Inventory” also lists a Medicaid claim against the estate. However, the record does not make reference to any claim having been filed.

* * *

14. The filing of the Final Report was ordered because the Personal Representative’s Inventory had failed to reveal any probate assets.
15. On June 9, 2005, the Personal Representative filed a document entitled “Personal Representative’s Report to the Court on the Estate of Norma Brookmyer.”
16. This “Report to the Court” is not a Final Report. However, the information contained therein is satisfactory for the court to determine that the administration is, based upon the Personal Representative’s Inventory and other matters in the record, complete.

Appellant’s App. at 13.

We first note that the probate court was authorized under Indiana Code Section 29-1-16-3(d) to order David to file a final report with the court. Upon review of that report, the probate court determined that Norma’s estate was insolvent. See Ind. Code §

29-1-14-19(d) (“If it appears at any time that the estate is or may be insolvent, that there are insufficient funds on hand, or that there is other good or sufficient cause, the personal representative may report that fact to the court and apply for any necessary order.”). As noted above, the court found that David’s “Inventory had failed to reveal any probate assets.” Appellant’s App. at 13.

David’s only argument to the contrary is that his report revealed the existence of a potential claim against Baker for breach of her fiduciary duty while serving as Norma’s attorney in fact. In his brief, he argues that Baker “did not comply with the statutory requirement for receipts and documentation as required by Indiana Code [Section] 30-5-6-4(a)(1).” Appellant’s Brief at 7-8. But, contrary to David’s contention, there is nothing in the record provided to support his claim that he requested an accounting under Section 30-5-6-4. The Chronological Case Summary shows that Baker filed responses to a discovery request, but the specific discovery request and her response are not in the record on appeal. David did not seek a motion to compel to remedy any allegedly incomplete discovery responses. Further, as noted above, any claim against Baker is barred by the statute of limitations. On the record presented, we conclude that the probate court did not abuse its discretion when it determined the estate to be insolvent.

We next address David’s argument that the probate court abused its discretion when it closed the estate without notice to creditors. Indiana Code Section 29-1-17-2, which describes the formal procedure for closing an estate, requires that “notice of the hearing of the petition [to close the estate] shall be given to all interested persons.” Ind. Code § 29-1-17-2(a). But if a probate court finds an estate to be insolvent, “the court,

with or without notice, may adjust, correct, settle, allow or disallow such account, and, if the account is settled and allowed, decree final distribution, discharge the personal representative and close the administration.” Ind. Code § 29-1-8-8 (emphasis added). Here, as noted above, the probate court found that Norma’s estate was insolvent. Thus, under Indiana Code Section 29-1-8-8, the court was not required to provide notice to interested persons of a hearing on the final report.

We disagree with David’s contention that Indiana Code Section 29-1-8-4 governs. That provision prohibits supervised estates from using the summary disbursement and distribution procedure for insolvent estates that is set out in Indiana Code Section 29-1-8-3. But Section 29-1-8-3 describes the procedure for disbursement and distribution of the assets in an insolvent estate. David does not argue that he was prevented from disbursing or distributing estate assets. Rather, David contends that the probate court should not have closed the estate. The closing of an insolvent estate is governed by Indiana Code Section 29-1-8-8, which does not require notice to creditors. Thus, we conclude that the probate court did not abuse its discretion when it closed Norma’s estate without giving notice to creditors.

Conclusion

The record indicates that David did not request an extension of the discovery deadline in the administration of Norma’s estate before that deadline had passed. As such, David has not shown, and cannot show, that the trial court abused its discretion by refusing to extend that deadline. And David has also not shown that the trial court abused its discretion when it entered an order closing the estate. The record supports the

probate court's conclusion that David had not provided evidence of any probate assets. The probate court determined, in effect, that the estate was insolvent. Thus, it did not abuse its discretion when it ordered the estate closed without providing notice to creditors.

Affirmed.

SHARPNACK, J., and ROBB, J., concur.